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## BOOKS AND PERIODICALS.

**TESTS OF INSANITY IN CRIMINAL CASES.** — The persistence of the knowledge of right and wrong test of insanity in criminal cases is one of the most striking instances of the conservatism of the law. This rule of responsibility was based on early medical error and cannot be reconciled with the doctrine of criminal intent in the light of modern scientific knowledge, yet it retains its place in England and in a majority of the jurisdictions in this country. The latest assault on this rule is in the form of a plea for the substitution of the irresistible impulse test. *Insanity in Criminal Cases*, by W. H. Parry, 63 Albany L. J. 429, 459 (Nov., Dec., 1901). This broader doctrine recognizes power both to distinguish and to choose between right and wrong as necessary for responsibility. It has received strong support in this country. *Montgomery v. Commonwealth*, 88 Ky. 509; see 8 HARV. L. REV. 360. Mr. Parry gives at length the testimony of many alienists in its favor.

It may be conceded that the rule advocated would allow the defence of insanity in a large majority of the cases where justice requires it. There is however a view which more completely reconciles law and medical science, the argument for which Mr. Parry does not seem to answer adequately. According to this doctrine there should be no absolute test and the inquiry of the jury should not be limited to any particular phase of the disease. The fundamental question of responsibility is whether the act is the product of insanity without the coöperation of a guilty motive. The insanity may cause the act by blinding one to the distinction between right and wrong, or by overpowering the will and compelling one to do what he recognizes to be wrong. It may work in other ways as by perverting a man's nature so that, purely as a matter of disease, he deliberately and voluntarily does what he knows is wrong. There are said to be patients so afflicted in every hospital for the insane, and under the test proposed by Mr. Parry these men would be punished for their insane acts. Since the forms and manifestations of insanity are so varied, there can be no absolute test applicable to all cases. The courts may and should point out ways in which the insanity may have acted, leaving the man free from responsibility, but they ought not to limit the range of the inquiry to one or several tests. This view is not without support in the courts. *State v. Pike*, 49 N. H. 399. Mr. Parry, however, argues that definite rules are necessary for the guidance of jurors, who are almost inevitably ignorant of diseases of the mind. But after the jury have been given the general legal rule, the needed enlightenment on the question of scientific fact in the application of that rule to the particular case comes most properly and surely from the testimony of medical experts. The gain in having a sound and just rule to save all truly insane men from punishment outweighs any increased danger of the abuse of the defence.

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**CONTRACTS IN RESTRAINT OF TRADE.** — A brief but suggestive article as to the extent to which agreements restricting trade should be upheld appears in a recent periodical. "*Is a Contract in Restraint of Trade Sustainable as an Independent Contract?*" by Frederick H. Cooke, 35 Am. L. Rev. 836 (Nov.-Dec., 1901). The author contends that only such restraints should be sanctioned as are incidental to a larger contract, as of sale or employment.

He argues that the reason for the general rule invalidating agreements in restraint of trade is "the evil produced by the withdrawal of a capable member of society from active production;" that this evil may at times be tolerated when, by the transfer of business, another member of society is given the opportunity, new or enlarged, of engaging in the same line of activity, but not otherwise; that the independent contract involves no such transfer, and consequently is not to be sustained.

Two criticisms may be passed upon the author's position, without denying his conclusion. First, he waives all discussion as to whether the restrictive agreement tends to suppress competition. The established test to be applied to such an agreement is that of "reasonableness;" the restraint must be no larger than is necessary for the fair protection of the parties and consistent with the interests of the public. *Nordenfelt v. Maxim, etc., Co.*, [1894] A. C. 535. From the standpoint of public interest, at least, it is clearly a material question whether or not the restraint will operate to suppress competition and foster monopoly. Secondly, the author apparently assumes that independent contracts necessarily involve no transfer of business. But where necessities form the subject-matter of the agreement, it is plain that transfer of business to others must ultimately follow, though not necessarily to the covenantee alone. In other agreements as well, it may result as a natural consequence. If, then, the question of monopoly were waived, and a decisive reason for the author's position were, as he suggests, the transfer of business, it seems that at least some independent contracts would stand on the same footing with ancillary agreements; and the distinction urged would have but little weight.

But though the distinction can hardly rest on the ground suggested, it may be conceded that it is not without force. Public policy demands that a covenant ancillary to the conveyance of a business should, if reasonable, be enforced; otherwise the whole contract for the sale of a business and its good-will might prove worthless. The independent agreement, however, is supported by no such consideration; and frequently its obvious purpose is to suppress competition. This, it seems, is the basis of the distinction. The question of monopoly, far from being immaterial, is of clearest importance.

That the distinction suggested is not without recognition is apparent from a recent Alabama case. *Tuscaloosa Ice Mfg. Co. v. Williams*, 28 So. Rep. 669. To the same effect is a *dictum* in *More v. Bennett*, 140 Ill. 69. See also 2 BEACH, CONT., § 1575. In some instances, however, though rarely, the independent agreement has been sustained. *Leslie v. Lorillard*, 110 N. Y. 519.

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RELIGIOUS BELIEF AS A DEFENCE FOR FAILURE TO PROVIDE MEDICAL ATTENDANCE. — The legal responsibility of one who substitutes in place of regular medical attendance a mode of treatment for illness prescribed by a religious body is a subject of growing importance. It is of interest therefore to find the criminal liability of parents for a failure under such circumstances to provide medical attendance for infants treated in a recent article by John H. S. Lee, 9 Am. Law. 565 (Dec. 1901). Certain preliminary questions are shown by the author to be well settled. It is established that religious belief is not a defence for failure to perform a legal duty, and that there is a legal duty at common law resting on a parent to furnish necessities to his child. Proper treatment and care when the child is ill are clearly necessities, and such treatment might often include medical attendance.

This series of propositions, however, merely leads up to the real difficulty of the subject. It is obvious that a parent is not always guilty of manslaughter for the death of a child resulting from failure from religious scruples to provide medical attendance. Mr. Lee makes criminal responsibility turn on the question "whether the defendant did in the particular instance act as a reasonably prudent man in like circumstances should have acted." This rule fails to recognize that the question is of the existence of the guilty mind, of wilful or grossly negligent omission to perform the duty, without which there can be no criminal liability at common law. The difficulty in these cases is that men who have done the best they knew cannot be held criminally liable. The plea of religious belief does not set up a defence for the violation of the duty, it negatives its very violation. The parent may make an ignorant and foolish mistake, but if he exercises his best judgment for the good of the child, he cannot be held guilty of culpable homicide. In such a case he would have no intention to avoid the performance of his duty, but would rather have a desire to perform it in the